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August 15, 2008

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VIA HAND DELIVERY

Jeff S. Jordan, Esquire
Supervisory Attorney
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

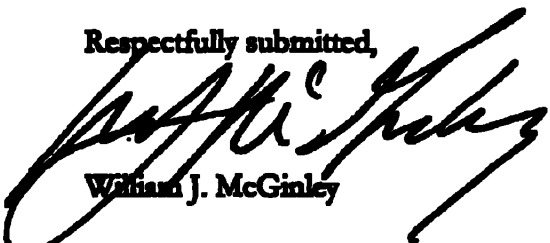
Re: MUR 5910
Americans for Job Security

Dear Mr. Jordan:

Please find attached the second supplemental response of our client, Americans for Job Security, to the notification by the Federal Election Commission of a Complaint filed against it by Public Citizen in the above referenced matter.

Please do not hesitate to contact us with any questions.

Respectfully submitted,



William J. McGinley

Attachment

cc: Chairman Donald F. McGahn II
Vice Chairman Steven T. Walther
Commissioner Cynthia L. Bauerly
Commissioner Caroline C. Hunter
Commissioner Matthew S. Petersen
Commissioner Ellen L. Weintraub

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BEFORE THE FEDERAL ELECTION COMMISSION

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In The Matter Of

)

MUR 5910

Americans for Job Security

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**SECOND SUPPLEMENTAL RESPONSE OF AMERICANS FOR JOB SECURITY
TO THE COMPLAINT FILED BY PUBLIC CITIZEN, INC.**

This supplements the original May 25, 2007 response¹ ("AJS Brief I") and the July 2, 2007 supplemental response ("AJS Brief II") of our client, Americans for Job Security ("AJS" or "Respondent"), to the notification by the Federal Election Commission ("Commission") of a Complaint filed against it by Public Citizen in the above-referenced matter.² Since AJS filed its original and supplemental responses in this matter, the Commission has issued new guidance regarding permissible electioneering communications, and the federal courts have handed down decisions that provide additional legal authority for the factual and legal arguments made in AJS's original and supplemental responses to the Complaint. For the reasons set forth below and in the original and supplemental responses, the Complaint is without merit and the Commission should find no reason to believe, close the file, and take no further action.³

¹ AJS's May 25, 2007 response to the Complaint contains an analysis of each communication referenced in the Complaint under 11 C.F.R. § 100.22(a) and (b) and is incorporated by reference. The analysis of each communication demonstrates that none of them constitute express advocacy under Commission regulations. Moreover, for the reasons set forth in AJS Brief I and II, and as explained below, none of the communications constitute the functional equivalent of express advocacy under the Supreme Court's test in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRIL*"), or Commission regulations. AJS's July 2, 2007 supplemental response contains an analysis of the Supreme Court's holding in *WRIL* and is incorporated by reference.

² Public Citizen's Complaint is actually comprised of two components. The first is the four page cover letter that constitutes the Commission Complaint against AJS that will hereinafter be referred to as "PC FEC". The second component is a Complaint Public Citizen allegedly filed with the IRS that contains the factual allegations that will hereinafter be referred to as "PC IRS".

³ As stated in AJS's May 25, 2007 response to the Complaint in this matter, the Respondent's brief, exhibits and attachments filed in response to the Casey campaign Complaint in MUR 5694 is hereby incorporated by reference.

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I. INTRODUCTION

As stated in AJS Brief I's factual discussion, each AJS communication listed in the Complaint contains a clear non-electoral call to action that urges the recipient or viewer to contact the referenced public leader to communicate his or her views on the issues discussed in the advertisement. No AJS advertisement identifies a public leader as a candidate, refers to an election, urges anyone to take any electoral action, or asks anyone to contribute to a campaign. Therefore, the AJS communications do not constitute express advocacy even under the expanded definition of express advocacy under 11 C.F.R. § 100.22(b), which has been held unconstitutional. Accordingly, the OGC must recommend, and the Commission must find, that there is no reason to believe that a violation of the Act was committed in this matter, dismiss the Complaint, and take no further action.

II. 11 CFR § 100.22(b) MUST NOT BE USED AS A SWORD OF ENFORCEMENT AGAINST AJS'S LEGITIMATE ISSUE ADVOCACY ADVERTISEMENTS BASED UPON RECENT COMMISSION ACTIONS.

Public Citizen's allegations that AJS's communications constitute express advocacy is premised entirely on 11 C.F.R. § 100.22(b). As stated in AJS Briefs I and II, this regulation suggests, notwithstanding the commands of *Buckley*, that in the absence of explicit words advocating the election or defeat of a clearly identified federal candidate, a communication may still qualify as express advocacy if, taken as a whole and with limited reference to external events, it can only be interpreted by a reasonable person as unmistakably, unambiguously, and suggestive of only one meaning that advocates the election or defeat of one or more clearly identified candidate(s).⁴ See *id.*

⁴ At least three federal courts have held that § 100.22(b) is invalid and unenforceable. See, e.g., *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001); *Right to Life of Dutchess County v. FEC*, 6 F. Supp.2d 248 (S.D.N.Y. 1998). In addition, several federal courts have held after *McConnell* that the express advocacy standard established in *Buckley* continues to limit the reach of vague campaign finance statutes. See *Center for Individual Freedom*, 449 F.3d 665 (5th Cir. 2006). Accordingly, *McConnell* did not resurrect § 100.22(b) from constitutional infirmity and the Commission should not use it as a basis for making a reason to believe finding against Respondents. While we analyzed AJS's communications under §

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The resurgence of the Commission's use of § 100.22(b) in the 2004 527 MURs lies with the General Counsel's Report #2 in MUR 5024R ("MUR 5024R OGC II"). In this report, the OGC argues that considering context when determining whether a communication constitutes express advocacy was constitutionally permissible in light of the Supreme Court's dicta in McConnell and other pre-WRTL II cases:

The Commission recognized the necessity of considering context when it promulgated section 100.22, adding a context element to both 100.2(a) and 100.22(b). See 60 Fed. Reg. at 35295 (June 6, 1995). The Supreme Court, however, has been virtually silent on the intersection of express advocacy and context, noting only in MCFL that isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy. 479 U.S. at 249-250.

MUR 5024R OGC II at 8 (emphasis added). The OGC further assured the Commission that the use of "context" would not unreasonably expand the scope of the regulation. In fact, the OGC opined that only a tiny fraction of communications will be deemed regulable under § 100.22(b):

By its very terms, section 100.22(b) is a carefully tailored provision, and everything that the Supreme Court stated in McConnell about the nature and limitations of express advocacy applies to section 100.22(b). Indeed, many communications will fall outside the scope of the regulation, from genuine issue ads that urge viewers to contact their representatives and urge them to vote against a certain bill, to 'sham' issue ads that appear the day before an election criticizing a candidate's position on an issue. As long as the communication can be reasonably interpreted to call for an action other than voting against a candidate – such as urging a candidate to change his or her position on an issue – the ads will not pass muster as express advocacy under section 100.22(b).

Id. at 9 (emphasis added). As demonstrated by the 2004 527 MURs, the OGC did not limit the scope of § 100.22(b) when pursuing respondents engaged in constitutionally protected issue advocacy. However, in the wake of WRTL, the OGC and Commission are cabined by the First Amendment and may no longer use context or other open-ended factors as vehicles to characterize a genuine issue ad as express advocacy when such a characterization is not supported by a four-

100.22(b) in AJS Brief I, such analysis must not be interpreted or construed as a waiver of our position that § 100.22(b) remains unconstitutional under the federal court decisions cited above.

corners analysis of the ad itself. See North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274, 284 (4th Cir. 2008) ("This sort of ad hoc, totality of the circumstances-based approach provides neither fair warning to speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech.").

Moreover, then-Vice Chairman David M. Mason's Statement of Reasons in MUR 5874 supported this position by calling into question the constitutional validity of § 100.22(b). Specifically, Vice Chairman Mason stated that the open-ended rough-and-tumble of factors of contextual factors contained in § 100.22(b) run afoul of the Supreme Court's holding in WRTL:

Considerations such as timing, the intent of the speaker, the effect of the communication, other speech made by the speaker, and different sources to which the communication refers are excluded contextual reference points. . . . Section 100.22(b) suffers from the exact type of constitutional frailties described by the Chief Justice because it endorses an inherently vague 'rough-and-tumble of factors' approach in demarcating the line between regulated and unregulated speech. . . . As the Court in Buckley explained, and WRTL II reaffirmed, the line between regulable express advocacy, or its functional equivalent, and issue advocacy must be protective of issue advocacy, easily understood, and give the benefit of doubt to speech.

MUR 5874 Mason Statement of Reasons at 3-4 ("MUR 5874 Mason SoR"). The Commission must abandon its recent policy using § 100.22(b) as a basis for regulating and investigating organizations such as AJS that sponsor legitimate issue advocacy advertisements. See Leake, 525 F.3d at 284 ("By carefully defining ['express advocacy' and its 'functional equivalent']", the Court not only cabined the legislature's regulatory power, but it also ensured that potential speakers would have clear notice as to what communications could be regulated, thereby ensuring that political expression would not be chilled."). Accordingly, the OGC must recommend and the Commission must find that none of the AJS advertisements referenced in the Complaint constitute expenditures under the Act.

Finally, the Court of Appeals for the DC Circuit recently opined in Shaya v. Federal Election Commission that the ads sponsored by AJS discussing the public policy positions of then-State Treasurer Bob Casey and Senator Rick Santorum did not constitute express advocacy. See Shaya v.

Federal Election Comm'n, 528 F.3d 914 (D.C. Cir. 2008). Specifically, the Court stated "[b]ecause none of these ads contained 'magic words' of express advocacy, all could have been coordinated with candidate's under the Commission's [coordination] rule." Id. at 924. Accordingly, the OGC and Commission must follow the Court's determination that the ads do not constitute express advocacy.

III. EACH AJS ADVERTISEMENT LISTED IN THE COMPLAINT CONSTITUTES A PERMISSIBLE ELECTIONEERING COMMUNICATION UNDER 11 CFR § 114.15.

In WRTL, the United States Supreme Court upheld an as-applied challenge to the ban on the use of corporate funds to finance electioneering communications. See FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007). The Court held that only communications that are the functional equivalent of express advocacy are subject to the ban on corporate funds financing electioneering communications. Id. at 2670 & 2673. A communication is the functional equivalent of express advocacy only if it "is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate." Id. at 2667. On the other hand, a genuine issue ad, which is not subject to the electioneering communication rules, lacks indicia of express advocacy because it does not mention an election, candidacy, political party or challenger, and the communication does not take a position on a candidate's character, qualifications or fitness for office. Id.

In the wake of this decision, the Commission promulgated an exemption from the corporate funding prohibitions set forth in 11 C.F.R. § 114.2. Advertisements qualifying for the exemption may be funded with corporate funds. See 11 C.F.R. § 114.15; 72 Fed. Reg. 72903. The Commission adopted a safe harbor provision with three prongs to determine whether a communication qualifies as a permissible electioneering communication. Corporations, including nonprofit corporations such as AJS, are permitted to make electioneering communications to the general public unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or

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against a clearly identified federal candidate. 11 C.F.R. § 114.15(a). A communication is permissible if it qualifies for the safe harbor by:

- (1) Not mentioning any election, candidacy, political party, opposing candidate, or voting by the general public;
- (2) Not taking a position on the candidate's character, qualifications or fitness for office; and
- (3) Focusing either on a legislative, executive or judicial matter or issue, and urging a candidate to take a particular position or action with respect to the matter or issue, or urging the public to adopt a particular position and to contact the candidate with respect to the matter or issue.

11 C.F.R. § 114.15 (b). A communication that satisfies the safe harbor provision demonstrates that it is susceptible of a reasonable interpretation other than as an appeal to vote for or against a federal candidate. Such communications are not the functional equivalent of express advocacy and may be paid for with corporate funds.

Under 11 C.F.R. § 114.15(c), if a communication does not qualify for the safe harbor provision, it may still qualify as a permissible electioneering communication. The Commission considers two factors under the balancing test: (1) whether the communication contains any indicia of express advocacy; and (2) whether the communication has content that would support a determination that it has an interpretation other than as an appeal to vote for or against a clearly identified candidate. *Id.* If, on balance, the communication has an interpretation other than as an appeal to vote for or against a federal candidate, the communication constitutes a permissible electioneering communication. *Id.* Any doubt regarding the permissibility of the communication must be resolved in favor of permitting the communication. *See* § 114.15(c)(3). The only evidence the Commission may consider in conducting the balancing test is the content of the communication

and limited background information such as whether the individual named in the communication is a federal candidate or whether the advertisement describes a public policy issue. See § 114.15(d).

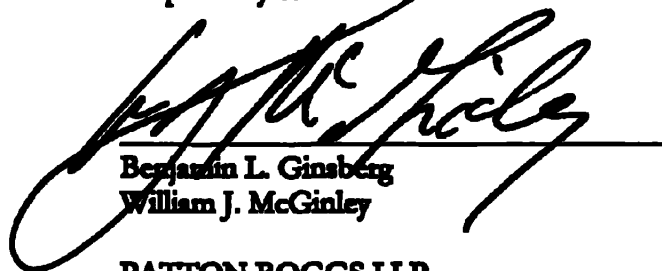
Of particular note, the Commission specifically addressed the permissibility of legitimate issue advocacy groups such as AJS to sponsor advertisements that discuss the public policy positions of candidates for federal office. First, the Commission opined in the Explanation and Justification that the reference to an officeholder's or candidate's past voting record does not constitute taking a position on an officeholder's candidate's character, qualifications, or fitness for office. 72 Fed. Reg. at 72904. Second, § 114.15 does not limit the subject matter of genuine issue ads to pending governmental issues. *Id.* Rather, a genuine issue ad need only address a governmental issue in an effort to generate interest in the issue. *Id.* ("Instead, the new rule covers ECs that focus on any legislative, executive or judicial issue regardless of whether it is pending before one or more branches of government. This revision allows organizations to address, for example, issues that they believe should be placed on the legislative, executive or judicial agenda in the future."). Finally, the regulation specifically permits issue advocacy groups to discuss the public policy positions of candidates who are not officeholders without the ad constituting an electioneering communication that may not be paid for with corporate funds. *Id.* ("Finally, the Commission agrees with those commenters who pointed out that issue advocacy groups may urge a candidate who is not a sitting officeholder to take a position on a legislative, executive or judicial issue, not because they want to advocate the candidate's election or defeat, but because they want the candidate to commit to taking action on a certain issue if the candidate is elected."). Accordingly, an objective, reasonable application of the criteria established in § 114.15 must result in a determination that each AJS advertisement referenced in the Complaint does not constitute either the functional equivalent of express advocacy nor express advocacy. See Leake, 525 F.3d at 285 ("In the meantime, political speakers would be left at sea, and, worse, subject to the prospect that the State's view of the

acceptability of the speaker's point of view would influence whether or not administrative enforcement action was initiated. Nothing in McConnell, WRTL, or any First Amendment tradition that we know of forces political speakers to incur these sorts of protracted costs to ascertain nothing more than the scope of the most basic right in a democratic society – the right to engage in discussion of issues of unquestionable public importance.”).

IV. CONCLUSION

For the reasons stated above and in AJS Briefs I and II, the OGC must recommend, and the Commission must find, no reason to believe, dismiss the Complaint, and close the file on this matter.

Respectfully submitted,

A large, stylized handwritten signature in black ink, likely belonging to Benjamin L. Ginsberg or William J. McGinley, is written over a horizontal line.

Benjamin L. Ginsberg
William J. McGinley

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